IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 745 OF 2001
IN
CHAMBER SUMMONS NO. 1203 OF 2000
IN
SUIT NO. 1578 OF 1981

M/s. Kiran Construction Company, A Partnership firm registered under the Partenrship Act, 1983, and having its Office at Jaya Terrace, Dr.Ambedkar Road, Opp: Hindmata Cinema, Dadar, Mumbai 400 014 ... Appellants/ (Org.Plaintiffs)

V/s.

1. Jagannath Sowar Vaity, since deceased through his LRs :-

1A. Mrs. Leela Vishnu Vaity, r/a.Building No.73,Ground No.2 Kurla Nehru Nagar, Kurla (E). Mumbai 400 070.

1B. Mrs.Kamal Prabhakar Vaity, r/a.Samadhan Building, Gavanpada, Mulund (E), Mumbai -81.

1C. Mrs.Sharda Raghunath Thombare, r/a.Room No.3, Thombre Chawl, Bhandup (E), Mumbai. (All are the daughters of deceased Jagannath S.Vaity).

1D. Mr.Sharad Jagannath Vaity

1E. Mr.Ramnath Jagannath Vaity

Both are sons of the deceased Jagannath S.Vaity and residing at Sowar Vaity House, Mulund (E) Mumbai -400 081.

2A. Gangabai Vishnu Vaity,

2B. Dwarkabai Vishnu Vaity,

2C. Kamlakar Vishnu Vaity,) ... Respondents/
2D. Martand Vishnu Vaity,) (Org.Defendants)
2E. Pandharinath Vishnu Vaity,)
2F. Narsa Vishnu Vaity,)
2G. Devta Vishnu Vaity, a minor)
under the age of 18 yrs., by)
her mother & natural guardian)
Dwarkabai Vishnu Vaity.)
)
2H. Lalita Vishnu Vaity, also a minor)
under the age of 18 yrs. by her)
mother and natural guardian)
Dwarkabai Vishnu Vaity,)
All i.e. 2A to 2H are residing)
at Yamuna Parvati Shram,Gavan)
Pada, Mulund (E), Mumbai-087.)
)
3A. Parvatibai Baburao Vaity,)
3B. Manohar Baburao Vaity,)
3C. Godavari Moreshwar Kotkar,)
3D. Damayanti Girinath Bhoir,)
3E. Chandrarekah Tukaram Vaity,)
3F. Jayeshree Shrirank Kumbhare,)
All residing at Yamuna Parvati)
Shram, Gavan Pada, Mulund (E),)
Mumbai 400 080.)
)
4A. Chhabibai Bhaskar Vaity,)
4B. Arvind Bhaskar Vaity,')
4C. Alka Bhaskar Vaity, a minor)
under the age of 18 yrs.)
by her mother & natural)
guardian Chhabibai B.Vaity)
All are residing at Yamuna)
Parvati Shram, Gavan Pada,)
Mulund (E), Mumbai 400 081.)
)
)
5. M/s.Modern Development Corporation)
in a Partnership Firm,business at)
14(5), Ismail Bldg,3rd floor,)
391,Dr.Dadabhoy Naoroji Rd.,Fort,)
Mumbai - 400 001.)
)
6. Ranganath Vishnu Samant, since)
deceased through his LRs :)
)
6A. Smt. Geeta Ranganath Samant,)
widow of Ranganath V.Samant.)
)
6B. Rajeev Ranganath Samant, son of)

the deceased Ranganath.)
Both residing at 1, Elias Court,)
Behind Mahim Post Office, Lady) ... Respondents/
Jamshedji Rd.,Mahim (W),Mumbai-16).(Ord.Defendants)
)
7. Sadanand Ganesh Naik,)
Chaitanya Co-op.Hsg.,Society,)
Goregaon (E),Mumbai 400 068.)
)
8. Sharif Hasan Majawan of Mumbai)
since deceased through his LRs:)
)
8A. Smt.Fatima Sharif Mujawar, Widow)
of deceased-Sharif Hasan Majawar)
)
8B. Anis Sharif Mujawar)
8C. Fayas Sharif Mujawar,)
both sons of deceased- Sharif,)
8A,8B & 8C are residing at)
Building No.'N', Flat No.1, 2nd)
floor, Opp. Harish Enterprises,)
Hanjar Nagar, Andheri (E),Mumbai.)
)
)
9. Bhaurao Raghaoji Patil, since)
deceased through his LRs :)
9A. Nitin Bhaurao Patil, son of)
deceased Bhaurao R.Patil, r/a.)
Nutan,Jaybharat Co-op.Hsg.Society)
Ltd., Opp.Revindra Natya Mandir,)
Prabhadevi, Mumbai -400 025.)
)
10. Gopinath Narayan Mayekar, since)
deceased through his LRs :-)

10A. Smt. Saliaja Gopinath Mayekar,)
Widow of deceased Gopinath.)
10B. Nitin Gopinath Mayekar,)
10C. Satish Gopinath Mayekar,)
10D. Bipin Gopinath Mayekar,)
10E. Sachin Gopinath Mayekar,)
10B to 10E are the sons of)
deceased Gopinath N.Mayekar)
All residing at 128/4245,)
Nehru Nagar, Kurla(E),Mumbai-24.)
)
11. Shri Ashokkumar Goel.)
12. Shri Anil Gosalia)
both carring on business at)
Pragati Shopping Centre,)
Malad (E), Mumbai 400 064.)

13. Karsondas Vriji Thakkar, since deceased through his LRs :	
13A. Mrs. Jayalaxmi Karsondas Thakkar	... Respondents/
13B. Ashwin Karsondas Thakkar, Both r/ at 36,Onlooker Bldg. Sir P.M.Rd,Fort, Mumbai -400 001	(Org.Defendants)
13C. Mrs.Jayashree S.Jatham, of Kutch (Gujarat) r/a. Barun Apartment, Grd.floor,Ghanshayam Nagar, Bhuj, Kutch -370 001.	
13D. Mrs. Mala D. Manek of Madras, r/a.Vandana Towers, Block No.1, Flat No. 106, 10, Haddows Rd., Chennai - 600 006.	
13E. Mrs. Rekha Popat, of United States, r/a. 1233, Tamarisk Avenue, Ridgecrest, California -93555, U.S.A.	
14. Bharat Karsondas Thakkar, r/a. Vaibhav, Tilak Rd., Ghatkopar, Mumbai 400077	
15. Karsondas Laxmidas Danani r/a. Madhya Villa, Jawahar Nehru Rd., Mulund, Mumbai 400 080.	
16. Shambhubhai Shivaji Thakkar, r/a.19/21,Vir Vithaldas Chandan Street,56/57,Malabriwalla House, Masjid Bunder Rd., Vadgadi, Mumbai 400 003.	
17. Ajit Bhaskar Vaity, heir & legal representative of Bhaskar Sowar Vaity, r/a.Yamuna Parvati Niwas, Gavan Pada, Navghar, Mulund (E),Mumbai-81.	
18. Mulchand G. Mehta, r/a.Tirupati Apartment, B.Desai Road, Mumbai 400 076.	
19. The Court Receiver, High Court, Bombay, office at Bank of India Building, Mahatma Gandhi Rd. Fort, Mumbai -400 023.	... Respondents/ (Org.Defendants)

Mr.D.D.Madon with Ms.D.Shah i/by M/s. Mulla & Mulla for the Appellants.

Mr.P.N.Modi i/by Mr. N. Janardhan for the Respondent Nos.13(a) to 13(e), and 14.

Mr.S.K.Shah i/by Mr.S.V.Mhatre for the Respondents Nos. 1(a) to 4(c), and 17.

CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATED : 16TH NOVEMBER, 2006.

ORAL JUDGMENT : (Per S.A.Bobde,J)

. By the order dated 21st June, 2001 the learned Judge taking up chamber summons, has refused permission to the Appellants-Plaintiffs to amend the plaint.

2. By the proposed amendment in the suit, the Appellants-Plaintiffs sought to join additional Defendants Nos. 13 to 19 in the suit and to add certain paragraphs and some prayers. The Appellants are hereinafter referred to as the Plaintiffs.

3. In brief, in this suit No.1578 of 1981 filed for specific performance of the agreements dated 18.06.1979 and 24.08.1979, by the proposed amendment, the Appellants- Plaintiffs sought to have the consent decree dated 6th of May, 1998 in Suit No. 252 of 1980, declared null and void. The addition of the parties and

the averments sought to be included are in support of that prayer.

4. The land which is the subject matter of this suit for specific performance of contract and the subject matter of the consent decree in suit No.252 of 1980, is admittedly the same. The original owners of the land are Vaitys, who are defendant Nos. 1 to 4. In the other suit being suit No.252 of 1980 they have been added as defendants, apparently by amendment.

5. In this suit, the plaintiffs have sought specific performance of the agreements dated 18.06.1979 and 24.08.1979. The first agreement is between the Vaitys and the defendant No.5 M/s. Modern Development Corporation, an unregistered partnership, agreeing to transfer the land to the latter. The second agreement is the agreement by which Modern Construction have agreed to transfer the land to the plaintiffs. The Vaitys having terminated the agreement on 15th May, 1981, the present suit was filed for specific performance of both the agreements.

6. The other suit in question, namely, Suit No. 252 of 1980 was filed by Karsandas Virji Thakkar and Bharat Karsondas Thakkar against Karsondas Laxmidas

Danani and Shambhubhai Shivaji Thakkar for declaration that a partnership existed between them and that the said Karsondas Laxmidas Danani and Shambhubhai Shivaji Thakkar had retired from Swas Construction. The Vaitys had apparently agreed to transfer the suit land to Karsondas Laxmidas Danani in 1973. The suit was filed on 18th February, 1980 and Receiver was appointed on 9th of October, 1980 in respect of all the assets and property of the said partnership, including the beneficial interest in the agreement for sale dated 1st of October, 1973, in respect of the suit lands. Eventually, after long pendency of that litigation, on some reconciliation the parties to that suit entered into the consent decree on 6th of May, 1998. This consent decree is sought to be set aside by the Appellants-Plaintiffs since, as a result of that consent decree the suit land was sought to be transferred to the plaintiffs, namely, Karsondas Virji Thakkar and Bharat Karsondas Thakkar and the defendants 1 to 21 therein. This transfer was made specifically subject to vacation of the order of injunction passed in the Suit No.1578 of 1981 (present suit) and Suit No. 1357 of 1983, pending before this court. Admittedly, that injunction has not been vacated till now though steps have been taken for having that injunction vacated. As such that injunction is continued by virtue of the order passed by this

court.

7. The obvious effect of this consent decree is that the suit land in respect of which specific performance is sought by the plaintiffs-appellants, has been transferred to the parties referred to above in the suit No. 252 of 1980. It is for this reason, interalia, the plaintiffs sought to amend the plaint in this suit in order to have the consent decree annulled. This amendment application which was made by way of Chamber Summons No. 1203 of 2000, has been dismissed by the learned single Judge.

8. We have heard the Appeal against that order.

9. After having heard the counsel for both the sides and after having perused the order in the Appeal, it is clear that the learned single Judge declined to grant the amendment on the ground that the Appellants' challenge, which was to the consent decree, was in reality referable to the agreement of sale of the year 1973 by which Vaitys are said to have agreed to transfer the suit land to Karsondas Laxmidas Danani, who is said to have brought the interest in the land to the partnership. The Appellants not having sought any declaration in respect of that agreement of the year

1973 within the period of limitation, the appellants were not entitled to challenge the consent decree which was passed in Suit No. 252 of 1980.

10. We, however, find that the amendment ought not to have been denied on this ground. The plaintiffs' application for amendment, challenging the consent decree dated 6th May, 1998 cannot be said to be barred by limitation. The Chamber Summons No. 1203 of 2000 made in the year, 2000, was well within period of limitation. The Appellants squarely sought to set aside the consent decree which was passed in the Suit No. 252 of 1980 since they were aggrieved by the effect of the consent decree. It was strongly urged by the counsel for the respondents that the consent decree was really based, interalia, on the agreement of 1973 entered between the parties and the appellants should have taken recourse against that agreement since, obviously they had knowledge of the existence of that agreement. It may be that the appellants had knowledge of the existence of that agreement but we see no reason why the Appellants ought to have taken recourse against that agreement when that agreement was merely an arrangement in respect of the property which had become subject matter of the partnership deed. In our view the Appellants were justified in seeking redress of the

agreement only when the agreement resulted in the creation of the interest in the property as a result of the consent decree. In these circumstances, it can hardly be said that the proposed amendment was not necessary to adjudicate effectively and completely the present controversy in the suit. In fact it is clear that the appellants would not be entitled to the relief of specific performance of contract unless they are allowed to question the validity of the consent decree or and the transferees under the consent decree are directed to join in for conveying the suit property to the appellants, Vide **AIR 1954 S.C.75, the case of Durga Prasad and Anr. vs. Deep Chand and ors..** It was urged on behalf of the Respondents that the parties to the suit No. 252 of 1980 cannot be said to be parties who can be arrayed as Defendants in the suit as proposed by the Appellants, because according to the Respondents, their interest and their relationship do not converge with the parties to the present suit. This argument has no merit. The persons sought to be added as parties to this suit are parties to the consent decree which is sought to be set aside.

11. The learned counsel for the respondents relied on the decision in the case of **Anil Kumar Singh vs. Shivnath Mishra, (1995) 3 Supreme Court Cases 147,** for

the proposition that on the principle underlying Order 1 Rule 3 only such persons may be joined in one suit as defendants where - (a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, and (b) if separate suits were brought against such persons, any common question of law or fact would arise. The learned counsel relied on the observations of the Supreme Court in paragraph 8, which reads as follows :-

> "8. The question is whether the person who has got his interest in the property declared by an independent decree but not a party to the agreement of sale, is a necessary and proper party to effectually and completely adjudicate upon and settle all the questions involved in the suit. The question before the court in a suit for the specific performance is whether the vendor had executed the document and whether the conditions prescribed in the provisions of the Specific Relief Act have been complied with for granting the relief of specific performance."

12. We, however, find that the aforesaid decision does not squarely apply to the circumstances of the present case. On the other hand, in the present case we find that there is injunction order obtained on 1st July, 1982, restraining the Vaitys from transferring, encumbering or parting with the possession of the suit property. This injunction was obtained by the Plaintiffs. The Vaitys were joined as parties in suit

No. 252 of 1980 before the consent decree was passed, presumably to make the consent decree effective. It is, therefore, clear that the transaction between the parties and in particular between the plaintiffs and the Vaitys is such that it is necessary for the plaintiffs to have the consent decree set aside in respect of the same property in the present suit by way of amendment to the present suit, after joining the parties to the consent decree, as parties here.

13. More-over, we find that section 19(b) of the Specific Relief Act contemplates a situation such as present one. That section reads as follows :-

> "19. Relief against parties and persons claiming under them by subsequent title.-- Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against --
>
> (a) .....
>
> . (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;
>
> . (c) .....
> . (d) .....
> . (e) .....".

14. It is obvious from clause (b) of the said Act, that a person, who claims under a title arising

subsequently to the contract which is sought to be specifically enforced, is a person against whom specific performance of the contract may be enforced against. It was contended on behalf of the Respondents that the persons sought to be added cannot be said to be the persons who have acquired title arising subsequently to the contract between the appellants and the original defendants since they acquired title in the year 1973 itself. We see no merit in this contention. The agreement between the parties to the suit No. 252 of 1980 may have been entered into in the year 1973; however, that agreement by itself does not create any interest in such property vide section 54 of the Transfer of Property Act. Clearly if any beneficiary of the consent decree has acquired any title it is by reason of the consent decree and in view of the Section 19(b) of the Specific Relief Act and must be allowed to be arrayed for the purpose of enforcement of specific performance of contract, if such specific performance is to be granted.

15. The learned counsel for the Respondents contended that amendment application ought to be rejected on the ground that it seeks to challenge a consent decree and no such challenge is permissible. They relied on Order XXIII, Rule 3-A of the Code of

Civil Procedure. Order XXIII Rule 3-A reads as follows :-

> **3-A. Bar to suit. -** No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

We find no merit in this argument. Firstly because Order XXIII, Rule 3-A does not disable a stranger to the compromise decree from seeking to set aside a decree. The plaintiff in this suit is clearly such a stranger to the consent decree. More- over, Rule 3-A, as has been held by this court, to bar a challenge to a consent decree only on the ground of it being "not lawful". A consent decree may nonetheless be challenged on the ground that it has a result of fraud or misrepresentation. (See: **Jethalal C. Thakkar vs. Lalbhai Hiralal Shah 1985 Mah.L.J.299** and **Suraj Kumari vs. District Judge A.I.R. 1991 Allahabad 75)**. By the proposed amendment the plaintiffs have clearly pleaded fraud and collusion, concealing material facts as grounds for setting aside the decree.

16. In the result, we allow the Appeal. Consequently, the Chamber Summons No.1203 of 2000 stands allowed.

17. The Appellants shall carry out amendment in the

plaint within a period of four weeks from today, after making necessary corrections in respect of proposed defendant No.13, who is reported to have expired and bringing in his place, his legal representative, who are respondents.

18. Obviously, the newly added respondents will be entitled to file written statement and the original defendants may file supplementary written statement within three months of the amended plaint being received.

(R.M.LODHA,J.)

(S.A.BOBDE,J.)